No. 89-635

In the Supreme Court of the United States

OCTOBER TERM, 1989

NATIONAL FEDERATION OF FEDERAL EMPLOYEES,
PETITIONER

v.

DICK CHENEY, SECRETARY OF DEFENSE, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE RESPONDENTS IN OPPOSITION

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QUESTION PRESENTED

Whether the Fourth Amendment prohibits random drug testing of civilian employees of the Army who serve as drug counsellors in the Army's Alcohol and Drug Abuse Prevention and Control Program.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1-29) is reported at 884 F.2d 603. The opinions of the district court (Pet. App. 35-50, 51-98) are reported at 680 F. Supp. 416 and 690 F. Supp. 46.

JURISDICTION

The judgment of the court of appeals was entered on August 29, 1989. The petition for a writ of certiorari was filed on October 19, 1989. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. This case involves three consolidated suits brought by federal employee unions, challenging the drug testing program adopted by the Department of the Army for its civilian employees. The program provides for random testing of civilian employees holding certain "critical jobs" constituting some 2% of the Army's 450,000 civilian positions. Pet. App. 4, 5. These employees fall into four categories: (1) employees who fly and service airplanes and helicopters, including air traffic controllers, pilots, mechanics and aircraft attendants; (2) employees occupying "[c]hemical and nuclear surety" positions, including nuclear reactor operators, nuclear weapons technicians, chemical ammunition maintenance specialists, quality assurance personnel, material handlers, laboratory workers, and others; (3) employees in law enforcement positions (mostly civilian police and guards); and (4) employees of the Army's Alcohol and Drug Abuse Prevention and Control Program (ADAPCP) (primarily drug counsellors and employees at the Army's drug testing laboratories). *Id.* at 16, 19, 21, 24.[1]

The district court held that the program violated the Fourth Amendment as to all four categories of jobs,

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[1] The program went into effect in 1986, before the President directed federal agencies to fashion drug testing programs for critical employees. Exec. Order No. 12,564, 51 Fed. Reg. 32,889 (Sept. 17, 1986). Following issuance of the Executive Order and the promulgation of drug testing guidelines by the Department of Health and Human Services, the Army amended its program to incorporate the HHS drug testing procedures. Those procedures were before this Court in *National Treasury Employees Union* v. *Von Raab*, 109 S.Ct. 1384, 1388-1389, 1394 n. 2 (1989).

and entered preliminary and final injunctions prohibiting implementation of the program. Pet. App. 35-50, 51-98.

2. The court of appeals reversed with respect to most of the employees included in the program. Pet. App. 1-29. In accordance with this Court's decisions in *National Treasury Employees Union* v. *Von Raab*, 109 S. Ct. 1384 (1989), and *Skinner* v. *Railway Labor Executives' Ass'n*, 109 S. Ct. 1402 (1989), the court of appeals focused on whether "the government's need to conduct the suspicionless searches outweigh[ed] the privacy interests of the covered employees in such a fashion that it [was] 'impractical to require a warrant or some level of individualized suspicion.'" Pet. App. 12. The court rejected petitioner's contention that *Von Raab* and *Skinner* were of "little or no impact" because the Army's program provides for testing on a random basis. *Ibid.*[2]

The court found that the balance of governmental and individual interests justified random drug testing of employees who fly and service airplanes and helicopters; the court explained that for these employees "[a] single drug related lapse * * * could have irreversible and calamitous consequences." Pet. App. 16. The court also approved the Army's program as applied to civilian police and guards, on the ground that these employees are armed (many with automatic weapons), and are often stationed at facilities housing nuclear reactors, toxic chemical agents, or large quantities of

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[2] On this point, the court relied on the D.C. Circuit's decision in *Harmon* v. *Thornburgh*, 878 F.2d 484 (1989), petition for cert. pending, No. 89-679. We are today filing our brief in opposition in No. 89-679.

munitions. *Id.* at 22. For employees in "[c]hemical and nuclear surety positions," the court of appeals remanded for further factual findings; it concluded that this category may have been drawn to include some employees who in fact do not have access to chemical or nuclear materials or to sensitive information. *Id.* at 19-21.

Finally, the court of appeals sustained random testing as to some employees of the ADAPCP program, and held it invalid as to others. The court upheld the program as to employees, principally drug counsellors, whose duties involve direct contact with clients of the program. The court found that the Army had a legitimate interest in assuring that its drug counsellors were not themselves drug users (Pet. App. 26):

> It is apparent that drug counsellors who themselves use illicit drugs, like drug-using interdiction agents, may "because of their own drug use, [be] unsympathetic to their mission." *See Von Raab*, 109 S. Ct. at 1393. This concern is all the more pressing because of a drug counsellor's full-time, largely unstructured contact with drug users. While the consequences of a drug counsellor's misplaced sympathies may not be as extreme as those attributable to drug use by drug interdiction personnel–risks to "our Nation's first line of defense" against the mass importation of illegal drugs and to the health and safety of the agents–the Army maintains a legitimate interest in ensuring that its employees are allegiant to their essential mission.

The court of appeals also concluded that drug counsellors have a diminished expectation of privacy with respect to drug testing because they "reasonably should expect heightened scrutiny into activities which

evidence such a basic infidelity to their mission." Pet. App. 26-27.[3]

Petitioners seek further review of the court's ruling with respect to drug counsellors in the ADAPCP program.

ARGUMENT

The court of appeals' holding that the Army may require random testing of its drug counsellors is faithful to the principles recognized by this Court in *Skinner* and *Von Raab*. Six circuits, including the court below, have rejected petitioner's principal contention, which is that the balancing analysis outlined in the Court's cases is inapplicable to *random* testing, and *Skinner* and *Von Raab* do not suggest otherwise. Further review is therefore not warranted.

1. Petitioner argues (Pet. 12) that there is a "crucial distinction" between programs providing for random drug testing and programs of the type at issue in *Skinner* and *Von Raab*. However, six circuits have now upheld programs proving for random drug testing against similar Fourth Amendment claims. *Guiney* v. *Roache*, 873 F.2d 1557 (1st Cir. 1989) (Boston police officers required to carry firearms), cert. denied, No. 89-205 (Nov. 13, 1989); *Transport Workers' Union, Local 234* v. *Southeastern Pennsylvania Transportation*

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[3] The court of appeals struck down the program to the extent that it provided for random testing of employees at the Army's drug testing laboratories. Observing that "a drug-related lapse by such an employee does not portend either direct or irreparable harm," the court found that "testing these employees lacks the necessary causal connection between the employees' duties and the feared harm." Pet. App. 27-28.

Authority, 884 F.2d 709 (3d Cir. 1989) (public transit employees); *Thomson* v. *Marsh*, 884 F.2d 113 (4th Cir. 1989) (Army civilian employees with access to chemical warfare material); *Taylor* v. *O'Grady*, No. 88-1783 (7th Cir. Nov. 1, 1989) (correctional officers in regular contact with prisoners); *Rushton* v. *Nebraska Public Power District*, 844 F.2d 562 (8th Cir. 1988) (nuclear power plant employees); *American Federation of Government Employees* v. *Skinner*, 885 F.2d 884 (D.C. Cir. 1989) (Department of Transportation employees with safety-sensitive jobs, including aircraft mechanics and safety inspectors); *Harmon* v. *Thornburgh*, 878 F.2d 484 (D.C. Cir. 1989) (Department of Justice lawyers with top secret security clearances), petition for cert. pending, No. 89-679.

Except for *Rushton*, which was cited with approval in *Skinner*, 109 S. Ct. at 1419, all of these decisions were issued after this Court's decisions in *Von Raab* and *Skinner*. Notwithstanding the fact that the programs at issue provided for *random* testing, the courts uniformly applied the balancing approach outlined by this Court last Term, which requires a court to weigh "the public interest in the * * * testing program against the privacy concerns implicated by the tests, * * * to assess whether the tests required * * * are reasonable." *Von Raab*, 109 S. Ct. at 1397. Thus, while some of the decisions have acknowledged that random testing is a factor that is relevant to the constitutionality of a program, the courts of appeals have rejected the contention that random testing calls for fundamentally different constitutional treatment. The statement of the District of Columbia Circuit in *Harmon* v. *Thornburgh*, 878 F.2d at 489, is representative:

> Certainly the random nature of the [agency] testing plan is a *relevant* consideration; and in a particularly close case, it is possible that this factor would tip the scales. We do not believe, however, that this aspect of the program requires us to undertake a fundamentally different analysis from that pursued by the Supreme Court in *Von Raab*.[4]

The uniform approach of the courts of appeals to random drug testing is entirely consistent with the reasoning of this Court's decisions. Contrary to petitioner's contention (Pet. 11), the Court's observation in *Skinner*, 109 S. Ct. at 1417, that a search may be reasonable without individualized suspicion "where the privacy interests implicated by the search are minimal" does not foreclose random testing. Random testing involves no greater physical restraint on the individuals tested than the program in *Skinner*. To the extent that the magnitude of the intrusion relates to the expectations engendered by the characteristics of an employee's job, see *id.* at 1418, nothing in this Court's decisions suggests that an employee has a fundamentally greater expectation in avoiding random testing tha·.

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[4] Random testing of incumbents holding sensitive positions is potentially more effective in deterring and detecting drug use than one-time testing of applicants for such positions. "While it is true that random testing may increase employee anxiety and the invasion of the subjective expectations of privacy, it also limits discretion in the selection process and presumably enhances drug-use deterrence." *American Federation of Government Employees* v. *Skinner*, 885 F.2d 884, 891 (D.C. Cir. 1989) (footnote omitted). This consideration may thus tend to tip the scales toward the governmental side of the balance mandated by this Court's cases.

the type of testing at issue in this Court's cases.[5] Thus, whether testing is random or not, this Court's decisions obligate a court to examine the particular characteristics of positions that are subject to testing to determine the extent of those employees' reasonable expectations of privacy. The court of appeals undertook that analysis in this case, and petitioner's disagreement with the court's valuation of the interests of the particular employees at issue does not warrant this Court's review.

The Court's decisions in traffic stop cases also provide no support for petitioner's position. See Pet. 12. The two decisive shortcomings in the discretionary license checks that were held unconstitutional in *Delaware* v. *Prouse*, 440 U.S. 648 (1979), are not present in the program at issue here. First, in *Delaware* v. *Prouse*, "every vehicle on the roads" was subject to seizure "at the unbridled discretion of law enforcement officials," and thus there was a "'grave danger' of abuse of discretion." *Id.* at 661, 662.[6] By contrast, the Army's testing program reserves *no* discretion to agency officials as to who will be tested.[7]

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[5] The Court's observation in a footnote in *Von Raab* that "applicants know at the outset that a drug test is a requirement of" the positions at issue there, mentioned as one of various factors that "minimize the intrusiveness of the Service's drug screening program," 109 S. Ct. at 1394 n.2, does not justify a fundamental distinction between random and universal testing programs.

[6] See also *Colorado* v. *Bertine*, 479 U.S. 367, 376-377 (1987) (Blackmun, J., concurring).

[7] The Army's program is subject to guidelines issued by the Office of Personnel Management that state that "[a]gencies are

Second, the discretionary license checks in *Delaware* v. *Prouse*, *supra*, entailed "signalling a moving automobile to pull over to the side of the roadway, by means of a possibly unsettling show of authority." 440 U.S. at 657. Here, the Army is required to provide advance notice of random testing,[8] thereby mitigating any tendency of the program to engender "concern or even

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absolutely prohibited from selecting positions for drug testing on the basis of a desire to test particular employees." Federal Personnel Manual Letter 792-19, 54 Fed. Reg. 47,324, 47,330 (1989). Once positions are designated for random testing, the OPM Guidelines suggest various methods of random selection: "their names or social security numbers may be selected randomly by computer, they may be selected according to their birth dates, or they may be selected by the first letter in their surnames." *Ibid.* Alternatively, the head of the agency may decide that all employees in the positions designated for testing shall be tested. *Ibid.*

Moreover, the procedures that must be followed in administering the drug tests are prescribed in detail by the HHS Guidelines–an additional protection against abuse or harassment. See Pet. App. 132-141.

[8] Executive Order No. 12,564 requires agencies, including the Army, to give their employees 60 days notice before a drug testing program is implemented. Pet. App. 124. In addition, employees who are subject to random testing must receive another notice, no less than 30 days before testing begins. Federal Personnel Manual Letter 792-19, Section 4.b., 54 Fed. Reg. 47,331 (Nov. 13, 1989).

To be sure, the particular time or date of the random test is kept a surprise, in order to deny employees who use drugs an opportunity to defeat the purpose of the tests by abstaining for a period of time. However, that degree of "surprise" is no different than that contemplated by the random checkpoint stops to which the Court alluded in *Delaware* v. *Prouse*, 440 U.S. at 663.

fright," *United States* v. *Martinez-Fuerte*, 428 U.S. 543, 558 (1976), and employees are informed discretely that they are to be tested. This combination of advance publicity and discrete notification provides "visible evidence, reassuring to law-abiding" employees, that the random tests are "duly authorized and believed to serve the public interest." *United States* v. *Martinez-Fuerte*, 428 U.S. at 559.

Indeed, the Court took care in *Delaware* v. *Prouse*, 440 U.S. at 663, to emphasize that States would be allowed to design "methods for spot checks that involve less intrusion or that do not involve the unconstrained exercise of discretion," and it held only that motorists could not "have their travel and privacy interfered with at the *unbridled discretion of police officers*" (emphasis added). See also *id.* at 663-664 (Blackmun, J., concurring) (noting that the result would have been quite different in a case involving "purely random stops (such as every 10th car to pass a given point)"). The Army's program is carefully designed to exclude "unbridled discretion" and thus is not suspect under *Delaware* v. *Prouse*, *supra*.

In short, nothing in this Court's cases suggests that a random testing program is so inherently intrusive that it constitutes a *per se* violation of the Fourth Amendment. Rather, as the court of appeals held, random programs should be analyzed within the framework established by this Court in *Skinner* and *Von Raab*.

2. Petitioner also maintains that the court of appeals "glossed over critical distinctions between front-line drug interdiction personnel and the Army's civilian treatment staff" and thereby "betray[ed] a fundamental misunderstanding of *Von Raab*." Pet. 13. In petitioner's view, the Army's interest in assuring that its drug

counsellors are not themselves users of drugs is not sufficiently compelling, judged by comparison to the justifications for drug programs at issue in this Court's cases last Term, to warrant testing without individualized suspicion. *Ibid.* The court of appeals, however, correctly rejected petitioner's narrow view of this Court's decisions.

Nothing in *Von Raab* suggests that the particular safety and security concerns involved in those cases are the only grounds that will justify drug testing. Moreover, as the court of appeals found, the Army has a strong interest in deterring and detecting drug use among its drug counsellors. Those counsellors occupy a critical place in the Army's comprehensive drug program, and drug use in their ranks is fundamentally incompatible with their function. Pet. App. 26-27. There is no doubt that a counsellor who uses drugs is at best unqualified to rehabilitate those who are attempting to control their addiction to drugs; at worst, such a counsellor may actually contribute to a patient's addiction. The risk that drug users will not provide effective treatment, although it may not immediately jeopardize public safety, threatens the lives and well-being of persons seeking help from the Army for their drug problems and subverts the essential purpose of the Army's drug treatment program. Even if *Von Raab* set a constitutional floor for the interests necessary for drug testing programs, the Army's interest in ensuring the effectiveness and integrity of its drug treatment efforts would easily meet that standard.

In short, the court of appeals faithfully applied the standards set forth by this Court last Term to the Army's drug counsellors. In our view, the court did not overvalue the Army's interest in the integrity of

those counsellors or undervalue their interests in confidentiality. But in any event, the court's assessment of those competing interests on the facts of this case does not raise an issue warranting this Court's review.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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* The Solicitor General is disqualified in this case.

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